92-0121

Garnet Angeconeb v. 517252 Ontario Ltd. and Ruby Cullen

Heard: Red Lake, Ontario
June 1 and 2, 1993

Board of Inquiry: Allan Manson

Appearances: K. Joachim, Counsel for Ontario Human Rights Commission
Garnet Angeconeb, Complainant
Ruby Cullen, Respondent
No one appearing on behalf of 571252 Ontario Ltd.

This Board of Inquiry was appointed by the Minister of Citizenship on January 15, 1993 to inquire into the complaint of Garnet Angeconeb against 571252 Ontario Ltd., Zoar Developments Ltd., carrying on business as the Red Dog Inn, and Ruby Cullen.

This complaint arises from a visit by Mr. Garnet Angeconeb, the Complainant, to the Town of Red Lake in December of 1988. It alleges discrimination by reason of race, colour or ancestry contrary to ss. 1 and 9 [formerly s.8] of the Ontario Human Rights Code in the provision of service by the Red Dog Inn. Zoar

Developments was the owner of the premises in question. However, the premises were leased by the numbered company at the material time and it was the numbered company, 571252 Ontario Ltd., who carried on business as the Red Dog Inn. The Respondent Ruby Cullen was the manager of the Red Dog Inn, and an employee of the numbered company.

Zoar Developments Ltd. is now in receivership. Counsel for the Commission, being satisfied that it was not involved in the operation of the Red Dog Inn, moved to amend the complaint by deleting Zoar Developments. Since there appeared to be no prejudice to the other parties, I granted the Commission's motion to amend the complaint so that the only named respondents are 571252 Ontario Ltd. and Ruby Cullen.

The complaint can be divided into two separate but related allegations. The first deals with the demand of a $100.00 deposit and the second relates to the room assigned to Mr. Angeconeb. These will be referred to as the "deposit issue" and the "room assignment issue".

The hearing of this complaint and its resolution have been complicated by three factors. First, the numbered company, although its representative participated in the teleconference to set the hearing dates, and although it was properly served with notice of the hearing, did not appear by counsel, agent or

representative. Secondly, the bulk of the written complaint was directed toward the deposit issue. Thirdly, Ms. Cullen was not represented by a lawyer but attended with a friend who acted as her agent or advisor. I will return to the issue of Ms. Cullen's role and her ability to address the allegations against her later.

I. FACTUAL BACKGROUND:

The basic factual allegations are not in dispute. The controversy lies in their interpretation and, especially, whether they were the result of discriminatory conduct which violated the Code.

Mr. Angeconeb is a professional journalist with a diploma from the School of Journalism at the University of Western Ontario. Prior to June of 1988, he had been the Executive Director of the Wawatay Native Communications Society which is a multi-media communications organization for the Nishnawbe-Aski Nation. Since June of 1989, he has been the Executive Co-ordinator of the Independent First Nations Alliance, a job which involves developing services and institutions for the First Nations communities of Lac Seul, Big Trout Lake, Muskrat Dam and Pikangikum. Between June, 1988 and June, 1988, he did freelance work for various organizations including the C.B.C. radio and the Wawatay Native Communication Society. In December of 1988, he was employed by the Windigo Tribal Council as a resource development co-ordinator. One

of his responsibilities was to arrange accommodations in the Red Lake area for those who enrolled in a mining training program for native people. It was for this purpose that he travelled to Red Lake on December 13, 1988.

Having arranged a number of meetings with people in Red Lake, Mr. Angeconeb phoned the Red Dog Inn on December 12, 1988 to reserve a room for the next day. During the telephone conversation, when he indicated that he would be paying with cash, he was told that a $100.00 deposit would be required. He testified before the Board that he was surprised by this request but, at the same time, familiar with it. Previously, in 1978, he had encountered a request for a deposit which he considered discriminatory and subsequently presented a complaint about it to the Ontario Human Rights Commission.

On December 13, 1988, Mr. Angeconeb arrived at the Red Dog Inn in the mid-afternoon. He went to the front desk where a woman was working and checked in. He gave her his name and car license number, and paid the basic room rate and taxes in cash. The bill totalled $56.70. In addition, the clerk asked him for a $100.00 deposit. In Mr. Angeconeb's words, he was "somewhat miffed". He explained that he had thought that a payment of $100.00 would cover the room rate plus deposit. When asked if he had a credit card, he

said that he did not. In fact he had one but did not want to mention it. After a "decent, civil" conversation, the clerk said that she would confer with the manager.

From June of 1988, to May 20, 1991, the Respondent Ruby Cullen was employed by 571252 Ontario Ltd. as manager of the Red Dog Inn in Red Lake. In most respects, there was no conflict between the accounts of Mr. Angeconeb and Ms. Cullen. On December 13, 1988, Ms. Cullen came to the front desk and discussed the deposit policy with Mr. Angeconeb. He questioned why a deposit was required. She said it was necessary to pay for any charges for telephone calls or the restaurant, or to cover the cost of damage. Mr. Angeconeb indicated that he had two telephone calling cards and could not spend very much in the restaurant since he would only be in Red Lake overnight. He also said that he had "never been disrespectful to other people's property". Mr. Angeconeb characterized the conversation as "decent, reasonable, without anger". In her testimony, Ms. Cullen indicated that a copy of the deposit policy was posted on the wall to the left of the desk. Mr. Angeconeb testified in reply that he did not see the notice. Ms. Cullen did not claim that she drew it to his attention. She allowed that it was not in a prominent position and that it could easily be missed. In fact, from subsequent correspondence it appears that her superior, Mr. John Munro, did not know that it was posted. Ms. Cullen agreed to reduce the deposit to $50.00. This amount was paid and a receipt given.

Mr. Angeconeb was assigned to Room 107 by the clerk. Exactly when this assignment occurred is unclear. Certainly, Ms. Cullen was present when the room key was handed to Mr. Angeconeb but she testified that she had no involvement with the actual room allocation. The front desk clerk was not called as a witness. Although Mr. Angeconeb described the clerk as a "caucasian" woman, Ms. Cullen identified the clerk as Frieda Isaacs, a woman of native background. Ms. Cullen explained that she did not call her as a witness because of ill health. For reasons that will be apparent later, neither the identity nor the background of the clerk, nor the mechanical details of the room assignment, are essential to the resolution of this case. It is sufficient that the person responsible for assigning rooms assigned Room 107 to Mr. Angeconeb. He left his bags in the room and left for a meeting at the Native Friendship Centre. He was running late and had no real opportunity to observe the room.

When he returned to the Red Dog Inn, the state of Room 107 became apparent. Mr. Angeconeb described it as "horrible". According to his account , it reeked of alcohol and cigarettes, there were cigarette burns on the rug and curtains, the bed spread was dirty, the bathroom was not clean, and there was no safety chain on the door. He took his bags and briefcase, and went to the front desk. He asked the clerk for another room and was taken to

Room 106 where he spent the night. He was not advised that better rooms were available. Room 106 was described as "not all that much better". It was "a bit cleaner" and had a safety chain. While Mr. Angeconeb did not consider it a great improvement, it was acceptable. Ms. Cullen did not dispute Mr. Angeconeb's factual description of the rooms but disagreed with his general characterization, especially the adjective "horrible".

After spending the night in Room 106, Mr. Angeconeb checked out on December 14 1988. At this time, he handed over the deposit receipt and asked for his deposit. When this was done, Mr. Angeconeb requested a copy of the original deposit receipt. The clerk was not prepared to do this. Ms. Cullen intervened. After some conversation about Mr. Angeconeb's reasons for wanting a copy, it was provided. On the copy, Ms. Cullen endorsed a note indicating that the $50.00 amount was an exception to the usual practice.

II. RELEVANT LAW:

(a) Procedural Issues:

The Respondent 571252 Ontario Ltd. did not attend the hearing although duly served with notice. During the teleconference conducted to set the hearing dates, the President of the numbered company, John Munro, indicated that it no longer operated the Red

Dog Inn, that it had no assets, and was not, in fact, operating at all. There was some suggestion that the company might be in the midst of some process of dissolution.

At the commencement of the hearing, the Board inquired of Commission Counsel as to the legal status of the numbered company. A search had been conducted at the Companies Branch of the Ministry of Consumer and Commercial Relations and I requested that it be updated. Subsequently, a Certificate of Status was filed with this Board confirming that the numbered company was duly incorporated according to the laws of Ontario on February 2, 1984 and that, as of June 7, 1993, it had not been dissolved. A search of the Ministry file did not disclose any other documents which would make me doubt its status, or that Mr. Munro is both the President and a Director of the company.

Although the absence of a representative from the corporate respondent produces some evidentiary problems, I am satisfied that I can consider the complaint against both the numbered company and Ruby Cullen, who has appeared to respond personally. Section 7 of the Statutory Powers Procedure Act entitles a tribunal to proceed with a hearing in a party's absence so long as notice of the hearing was given. The teleconference and the written notice satisfy this requirement (see Middleton v. 491465 Ontario Ltd et al (1992), 15 C.H.R.R. D/317).

With respect to the legal status of the numbered company, the evidence provided at the hearing confirms that the company has not been dissolved and continues as a legal entity. Therefore, there is no doubt that it is a proper respondent. Even if any steps have been taken towards dissolution, I am satisfied that this Board can proceed. In Rapson v. Stemms Restaurants Ltd.,(1991), 14 C.H.R.R. D/449, another Ontario Board of Inquiry concluded that s. 241(1) of the Business Corporations Act, 1982, S.O. 1982, c.4, as amended by S.O. 1986, c. 57 and c. 64, provides the authority to continue a proceeding commenced against a corporation before its dissolution.

(b) Substantive Issues:

The Commission must prove on a balance of probabilities that the conduct of the Respondents, or either of them, towards Garnet Angeconeb at the Red Dog Inn between December 12 and 14, 1988 constituted discrimination because of race, ancestry, or colour, in the provision of services contrary to s.1 of the Code, or an infringement of a right contrary to s.9 of the Code. The Commission's position is that the circumstances of this case qualify under the rubric of provision of services such that the complaint is properly brought under section 1 rather than section 2, the accommodation section.

The relevant sections provide as follows:

> "1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part."

Various forms of treatment or conduct may constitute discrimination within the scope of s.1 of the Human Rights Code. Clearly, there is no need to prove intention in order to establish discrimination (see O'Malley v. Simpsons-Sears Ltd.,[1985] 2 S.C.R. 536]). In O'Malley, McIntyre,J. explained the anti-discrimination objectives of the Ontario Human Rights Code in the following terms:

> "The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discrimination, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory." (at page 547)

McIntyre,J. amplified his explanation of discrimination in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, where he said:

> "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or withholds or limits

> access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed." (at pages 174-75)

He quoted from the judgment of Dickson, C.J.C. in the Action Travail des Femmes case, [1987] 1 S.C.R. 1114 who adopted, at pages 1138-39, the conceptualization of discrimination found in the Abella Report on Equality in Employment. That document spoke of "practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's rights to the opportunities generally available because of attributed rather than actual characteristics..." Moreover, Abella explained that it is "not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems".

At the heart of any act of discrimination lies some form of differential treatment or impact which, to be actionable under the Code, can be attributed to a prohibited ground. A denial of access based on a prohibited ground is inherently discriminatory; so too is a restriction of access. With respect to the provision of services, differential treatment may arise in various ways. An impediment or bar to service applied to some but not others constitutes differential treatment.An additional charge, burden, or obligation imposed on some but not others constitutes differential

treatment. The provision of a different quality of service, or service which differs in extent, duration or location from that available to others may also be discrimination if based on a prohibited ground. The set of differential treatments which may infringe the Code is extensive and diverse. The common thread is a combination of difference, denial and disadvantage.

Differential treatment is discrimination which violates the Human Rights Code when the reason for it, whether intended or not, can be attributed to a prohibited ground. The attribution may be in whole or in part. This is so because section 1 of the Code is framed in positive terms focusing on the right to equal treatment without discrimination, rather than a prohibition against discrimination. Thus, it has been interpreted as requiring only that a prohibited ground be part of the reason for differential treatment in order to constitute actionable discrimination (see J. Keane, Human Rights in Ontario, 2nd. Ed, at page 5.)

With respect to race, ancestry and colour, instances of intentional discrimination may be difficult to prove, but the concept is not difficult to understand. Bigotry is often manifested through acts of intentional discrimination. Unintentional discrimination, however, may be less clear. Often, it involves acting upon internalized prejudices regardless of whether the prejudice is consciously appreciated as such by the actor. It can arise, for example, where personal characteristics

are reflected onto an individual because of a racial or ethnic stereotype. If a service provider acts upon the assumed characteristic, any differential treatment flowing from this process of stereotypical attribution would be discrimination within the meaning of s.1. This is a common form of unintentional yet still invidious discrimination.

Section 9 of the Code ensures that individuals are protected both from direct acts of discrimination and also indirect forms of discrimination. This may occur where the target of the discrimination is not the complainant but rather someone who is associated with the complainant, like a guest or visitor to an apartment. The provisions might also apply in situations of condonation or abetting where the respondent was not the initiator or source or the discrimination but acted to condone or abet the discriminatory conduct.

In this case, it is clear from Mr. Angeconeb's complaint that he considered the demand for a $100.00 deposit an extraordinary burden which would not have been imposed on a non-native person. With respect to the room assignment, Mr. Angeconeb's complaint is that he felt he was assigned an inferior room at the Red Dog Inn because he was native. Both of these allegations, if supported by the evidence, can constitute discrimination within the meaning of s.1 of the Code. In her submissions, Commission counsel also argued that a finding of discrimination against the numbered

company as a result of the practices of that company might, through the operation of s.9, result in a finding that Ruby Cullen, the manager, indirectly infringed the Code by condoning what the company had done.

(c) Evidentiary Issues and the Standard of Proof:

Common to many human rights cases, most of the evidence adduced in this case was circumstantial. This requires consideration of the proper standard of proof and the extent of inferences which can be drawn. The proper standard of proof was explained by Professor Borins, as he then was, in Kennedy v. Mohawk College (1973):

> "Discrimination on the grounds of race or colour are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discrimination situation or occurrence. In a case where direct evidence or discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is int issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises. In my view, such conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course, places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature and purpose of such conduct. It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted...."

This approach has been broken down into three elements: (1) Does

the evidence support a prima facie inference of discrimination? (2) Has the respondent offered a rational non-discriminatory explanation? (3) Is this explanation credible on all of the evidence?: see Mitchell v. Nobilium Products Limited (1982), 3 C.H.R.R. D/641 (Ont. Bd. of Inquiry).

In this case, a further evidentiary issue arises as a result of various exhibits tendered by Commission Counsel. First, there was a package of room receipts covering a two week period chosen at random by a human rights officer from a box containing similar packages. Secondly, there were copies taken from the room register for the Red Dog Inn covering the period from October 24, 1988 to January 30, 1989. In both cases, Counsel also submitted analyses of these documents prepared by the Commission intended to support certain propositions about the assignment of rooms as between native and non-native customers. Neither analysis was provided through an expert who could comment on the methodology or the propriety of drawing inferences from the data as chosen and presented. Some evidence was obtained from the complainant himself. He was asked to offer opinions, based on his experience with native organizations and communities in Northern Ontario, on whether certain names found in the documents could be considered native or non-native. At the hearing, I permitted this evidence subject to subsequent consideration of admissibility.

The approach to statistical evidence in human rights cases

was considered in depth by Professor Cumming in Blake v. Ministry of Correctional Services(1984), 5 C.H.R.R. D/2417. That case involved a complaint of discrimination based on the grounds of sex, race and age arising from a refusal of employment as a prison guard. The complainant was a black woman of 50 years of age. On paper, she appeared to have the requisite qualifications. The Ministry's files were reviewed by a human rights officer and evidence was adduced indicating, for specific periods of time, the names and backgrounds of those people who had applied for jobs, who had received interviews, and who had been subsequently hired. This raw data was analyzed by a statistician who testified about his findings of disparity and the factors which he considered to be significant in explaining disparity. It appears that this evidence was the major component of proof of the complaint. The case arose prior to the Supreme Court's O'Malley decision and, hence, required proof of an intent to discriminate. Consequently, it was necessary for Professor Cumming to consider not simply the ways in which statistical evidence can show disparity but also the more difficult question of the impact of statistics on the proof of an intent to discriminate. While the individual complaint was ultimately dismissed, the Board found that the statistical evidence was sufficient alone to establish a prima facie case and concluded that "discrimination because of sex was endemic to the recruitment system..." The extensive analysis of the admissibility, implications, strengths and weaknesses, of a similar form of statistical evidence assists in developing an approach to the

evidence in this case and the issue of differential treatment.

From the Blake case, a number of general propositions can be distilled. Statistics may be used both to show discriminatory impact or to show that a non-discriminatory reason offered to explain a situation is a cover-up for a discriminatory reason. Statistical evidence alone may satisfy the burden of establishing a prima facie case, or statistics may be used in conjunction with testimony of a specific discriminatory instance. Statistics are best used in conjunction with testimony describing specific instances of discrimination to bring the numbers to life.A prima facie case established through statistical evidence may be rebutted either by evidence which offers a non-discriminatory explanation of the specific situation or by challenging the statistical evidence. A challenge can be directed to the qualifications of the statistician or the methodology employed. As well, evidence of disparity can be shown to be insignificant or the result of non-discriminatory practises. Arguments based on the role of certain variables excluded from, or included in, the analysis are more contentious. On this point, Professor Cumming concluded :

> "Statistical evidence may not be rebutted by mere hypothesis or conjecture that the exclusion or inclusion of certain variables improperly skews the results rendering the statistical [evidence] unreliable. The respondent must prove that these variables have a relevant effect on the statistical result either by reworking the complainant's data or presenting its own statistical evidence incorporating the relevant variables." (at para. 20107)

Thus, the exclusion of variables is similar to a non-discriminatory explanation in that evidence capable of rebutting the prima facie case must be adduced.

As in the case before me, the Blake case also raised questions of expertise, adequacy and accuracy in relation to admissibility and weight. I agree with the general approach taken by Professor Cumming. The compilation of raw data derived from existing unalterable facts does not need expertise. This is distinct from statistics like the results of a public opinion poll or other data compilation which requires interpretation. It would be an excessive burden on the Human Rights Commission to demand that experts be hired to compile data. With respect to the weight to be given to statistical evidence, it should not be affected by an assertion of partiality as to the compilation of the data but requires a showing that the compiler's bias affected the data. The subsequent analysis of data is a different story. Although Professor Cumming suggests (at para. 20116) that the "data must then be evaluated in accordance with recognized scientific principles and introduced in evidence through an expert", I do not believe that he was offering a pre-condition to admissibility. Earlier, he said:

> "Any lack of expertise on the part of the analyst affects the weight to be given his or her analysis but does not require its outright rejection." (at para. 20112)

This is consistent with the observation (at para. 20108) that

"insufficient statistics" may be combined with other evidence to generate the necessary prima facie case. Thus, while statistical evidence based on deficient data or inadequate analysis cannot support a claim by itself, in combination with other evidence a sufficient case of discrimination may be established, unless it is so unreliable that it is worthy of no weight. In other words, statistical evidence, unless entirely unworthy of weight, provides another bit of circumstantial evidence which, in its totality, may or may not be sufficient to support an inference of discrimination.

III. APPLICATION OF THE LAW TO THE EVIDENCE:

(a) The "deposit" claim:

In her closing submissions, counsel for the Commission abandoned this part of the complaint. No evidence was adduced to show that non-native cash customers at the Red Dog Inn were not met with a similar request. The Respondent Cullen testified that the $100.00 deposit was company policy. A notice setting out this policy was apparently on a wall in the lobby and a copy of the notice was made an exhibit. The reasons given for the policy were concerns about damage and unpaid charges. The complainant was insulted by this evidence and considered it to be a form of

stereotypical characterization. While this may be so, unless it can be attributed to one of the grounds prohibited by the Human Rights Code, and the attribution proven on a balance of probabilities, then the complaint has not been established. On the evidence, this aspect of the complaint was not established and abandonment was a prudent approach.

However, one matter warrants comment. Much of the original complaint and, consequently, the original respondent's questionnaire prepared by the numbered company were addressed to the deposit issue. Moreover, the specific references to the Respondent Cullen were in relation to the deposit. Quite expectedly, especially since she was not represented by counsel, most of her attention was directed to this issue. I mention this now because of the condonation issue raised by counsel in her submissions. Counsel argued that a finding of discrimination on the part of the Respondent 571252 Ontario Ltd. based on the room assignment to Mr. Angeconeb would also justify a finding of discrimination in respect of the Respondent Cullen. She argued that Cullen's role as manager supported this conclusion. Having heard the evidence and the submissions, Cullen was obviously and understandably prepared primarily to respond to the deposit issue. While I do not want to be taken as commenting on the sufficiency of the pleadings, the issue of condonation or indirect participation was not specifically alleged in the complaint. In a situation where the employer respondent did not attend the hearing and where

the employee respondent was not represented by counsel, I am not satisfied that the Respondent Cullen had adequate notice that liability might be established in this derivative way. In these unusual circumstances, it is my opinion that it would be unfair to make such a finding regardless of its merits in law. Accordingly, I do not intend to consider the issue of condonation or indirect participation as it relates to the Respondent Cullen.

(b) The room assignment complaint:

On the evidence, there are four elements to this part of the complaint:

1. Mr Angeconeb was initially assigned to an unacceptable room;

2. After voicing his dissatisfaction, he was given a room in the same part of the hotel which was only marginally better;

3. At no time was he told that better rooms were available in the annex, even if the cost was greater;

4. Mr. Angeconeb was treated in this manner because he is native, an Ojibway from the Lac Seul First Nation.

In other words, the complaint consists of an allegation of discriminatory treatment by reason of race, ancestry, or colour.

It was alleged that the Red Dog Inn followed a practise or convention whereby, in most situations, native persons were assigned rooms in the hall to the left of the front desk numbered 101 to 110. This did not occur without variation. However, it was

more likely that a native person would be assigned to this area than a non-native person. While it was alleged that these rooms were inferior to those in other parts of the hotel, Ms. Joachim submitted that, to establish the complaint, the Board need only be satisfied on a balance of probabilities that native persons were streamed into one section of the hotel. Whether the rooms were substandard is not a necessary element. Upon considering the evidence of the complainant and a human rights officer who viewed the rooms, and the response of Ms. Cullen, I am satisfied that the rooms in the hall in question were inferior to other parts of the hotel, and in some cases were unacceptable. The difficult question is whether Mr. Angeconeb's assignment to room 107 and then room 106 was attributable, in whole or on part, to his race, ancestry or colour. Was it part of a discriminatory practise?

(i) The Complainant's Evidence:

As recounted above, the complainant explained how he was originally assigned to room 107, a room which was dirty, smelly, damaged and without a lock. When he asked for another room, the new one, room 106, was a bit cleaner and had a safety chain. He described it as "not a great improvement" but acceptable. A human rights officer who viewed the rooms in 1990 said they were in "very bad condition". The Respondent Cullen did not dispute this description. At no time was he told that better rooms were available in the annex. The evidence of the complainant establishes

only that he was assigned a room which he, and most other people, would consider unacceptable. Certainly, he feels badly treated. In his own words, he was "insulted and belittled in his dignity as an aboriginal person". While the complainant's subjective response to his treatment may be relevant to remedy, it cannot by itself support an inference of discrimination.

(ii) The Statistical Evidence:

During her visit to the Red Dog Inn, a human rights officer asked to see the hotel's registration receipts. She was shown a box which contained numerous packages of receipts each covering a chronological period. She removed two bundles consisting of eighty-eight pages covering the period March 13 to 20, 1989. These represented 67 different room assignments and were introduced as an exhibit. Each one contained a name, home address and the number of the room assigned. Some registration records indicated the patron's employer.

Counsel attempted to use these records (the raw data) to show that native persons were assigned to rooms 101 to 110 at a more frequent rate than non-natives (the analysis). This exercise required that the names of hotel patrons be classified into three groups: (1) native; (2) non-native; and (3) not clear. For this purpose, she elicited opinion testimony from the complainant, Mr. Angeconeb. It would have been preferable for this function to have

been performed by someone else to remove any question of partiality. As I indicated before, where interpretation is required, both the compilation of data and its analysis may be subject to challenge on the ground of partiality. A mere assertion of the challenge is not enough. It must be shown that partiality affected the data. Here, having heard Mr. Angeconeb, I am satisfied that he offered his opinions fairly and honestly.

Counsel submitted that Mr. Angeconeb had expertise with respect to identifying native names as a result of his professional and political experience. His source of qualifications included his work with the Sioux Lookout Friendship Centre, as editor of an aboriginal newspaper(the Wawatay News), as executive director of a multi-media communications organization for the Nishnawbe-Aski Nation, and as a native language radio broadcaster in Thunder Bay. He had travelled extensively throughout northern Ontario and was familiar with all the native communities. I accepted that his personal experience permitted him to offer opinion evidence as to whether a name was native or non-native where the home address was in northern Ontario. Because he was familiar with those communities, their families, and many of the larger employers, he was, in my view, able to draw inferences from the name, address, and employer. He knew some of the patrons personally or knew their families. In other instances, he was familiar with the employer, especially institutional and governmental employers, and testified that in the particular locale no native persons were employed by

that employer. However, once we moved out of the north, the only real indicia were the names themselves and these could be misleading. For example, the surname "David" was identified as a name carried by some members of the Mohawk Nation. However, given that it belonged to someone identified as a member of the Canadian Forces from Manitoba, Mr. Angeconeb agreed that his opinion could easily be wrong. Accordingly, a few names originally in the native category had to be moved to the "not clear" group. Similarly, a few names listed as "non-native" also had to be re-categorized. It was really only a guess whether Mr. Williams from Mississauga was native or non-native. Still, after accounting for these deficiencies, it was argued that the breakdown supported two propositions:

1. Significantly more native people were assigned to rooms 101 to 110 than non-natives;and

2. Significantly more non-natives stayed in the better annex rooms than natives.

But is this evidence admissible and what does it prove?

A number of concerns could be raised about this evidence First, the sample was small, covering only one week. It was, however, randomly chosen. Without some expert evidence on this point, it would be wrong for me to guess at whether the sample was sufficient or not. While I would have appreciated assistance on this aspect, I will take the approach that the mere assertion of the challenge is not sufficient. Hence, there is a presumption in

favour of the soundness of the methodology.

Secondly, the categorization process was based only on the information on the face of the record as interpreted by the complainant himself. This issue affects weight not admissibility (see the discussion of the Blake case, supra). After reviewing the categorizations, I am satisfied that the process was not so defective as to render the product of the exercise unreliable when viewed in gross terms.

Thirdly, it could be argued that the disparity was insignificant. On the question of significance, the records seem to show that virtually all the people assigned to rooms 101 to 110 during the period were native. There appeared to be no non-native persons assigned to these rooms and one assignment which was "not clear". Sorting out the "not clear" category could only move the data even more in favour of the proposition. Therefore, I am satisfied that the disparity was significant. With respect to the annex building, there were 38 room assignments. According to the analysis offered, only 5.62% of the guests assigned to these rooms were native. If every single person categorized as "not clear" could be shown to have been a native person, this figure would rise to 34.21% Certainly, without the "not clear" category, the analysis supports the conclusion of significant disparity. If the "not clear" category was divided artificially in equal number between native and non-native, it would produce an assignment of

19.73% to native persons. Consequently, I am prepared to conclude that the disparity was significant.

The fourth question is whether a non-discriminatory reason was advanced for the disparity. Ms. Cullen addressed these questions in her testimony. Essentially, this is part of the general approach to circumstantial evidence: whether rational and credible non-discriminatory reasons exist for the apparent discrimination. With one exception, Ms. Cullen's testimony raised general explanations applicable to the hotel's operations. The one exception relates to the fact that a hockey tournament took place in Red Lake during the week to which the statistical evidence refers. The Board will deal with Ms. Cullen's general evidence after considering whether there is a prima facie case of discrimination.

During the week of March 13 to 20, 1989, a hockey tournament brought a number of native teams to Red Lake. Since rooms 101-110 in the main building had two double beds, it was suggested that this explained why so many native persons were assigned to rooms in that section, and thereby removed the apparent disparity. The hockey tournament was confirmed in part by reference to the room records. The same records showed that it covered only five room assignments and, in two rooms, only two people were registered. Hence, the need for bed space did not explain the assignments. At most, the hockey tournament

explanation may diminish the disparity but it does not remove it.

After considering all of the statistical evidence and the concerns raised about it, the Board concludes that it has some value in establishing discrimination notwithstanding its deficiencies and frailties. By itself, however, it was not sufficiently clear and methodologically sound to establish a prima facie case. This is not to say that in another case a similar analysis carried out with expertise and impartiality could not achieve this result. In this case, the size of the sample, the method of categorization, and the ultimate statistical analysis diminished the cogency of the evidence.

(iii) The Evidence of the Human Rights Officers:

Two officers gave evidence of their investigation including their conversations with Mr. Munro and Ms. Cullen. The first officer described the rooms and organization of the hotel. She conveyed some conversation about "rooms for fishermen". This reference was not explained but was interpreted by the witness as suggesting that rooms were set aside for specific people. She was prepared to draw inferences from her interviews that suggested the hotel also maintained separate rooms for natives. Because of the consistent denial by representatives of the hotel, combined with the officers fading memory of the conversations, the Board was not prepared to put a similar interpretation on her interviews.

The second officer, Ms. Thunder, met with Mr. Munro at her office on October 31, 1991. Mr. Munro did not become involved with the Red Dog Inn until September of 1989. His predecessor died suddenly in an airplane crash. As president and director, he was authorized to speak on behalf of the numbered company. Ms. Thunder testified that Mr. Munro admitted that some native people were given inferior rooms because of their past conduct. He complained of damage which he attributed to native guests and spoke in an angry tone. She testified that he spoke of rooms which he characterized as "native rooms". Candidly, she admitted that she probably used the phrase first in their conversation. Her evidence was given frankly. I have no hesitation in accepting it. However, it contained no explicit admission by Mr. Munro and, accordingly, must be included with all the other evidence to determine whether a prima facie case of discrimination has been established.

(iv) The Evidence of Constable Trivett:

While the testimony of Ontario Provincial Police Constable Paul Trivett was the shortest of all witnesses who testified at the hearing, it has proven to be considerably influential. Constable Trivett was stationed in Red Lake from 1986 to 1989. He testified about a telephone conversation he had with the night clerk at the Red Dog Inn on December 28, 1988, only two weeks after Mr. Angeconeb's visit. His evidence was identical to the account in a letter dated December 31, 1988 which he sent to the Ontario Human

Rights Commission. It was made an exhibit at the hearing and it will be useful to refer to that account in its entirety:

> On the 28th day of December 1988 at approximately 1:30am, two persons attended the Red Lake O.P.P.detachment suggesting they were having difficulty obtaining lodging at the local motels.
> I contacted the desk clerk at the Red Dog Inn on their behalf and inquired about the availability of a room. The clerk's first question was, "are they natives?" When I asked if it made any difference, he replied, "No,..its just that all the native rooms are occupied."
> When I advised the clerk that the two men were white he indicated a room would be available at $62.50 including tax. As a police officer I recognize our obligation to report violations of the Code to the Human Rights Commission and therefore I have documented this incident for your attention. Being that I am a Metis and father/husband of status Indians I recognize that there could be a conflict of interests in my continuing to assist in any resulting investigation.
>
> Thank you for your attention in this matter,
>
> Paul R. Trivett,P/C #6890
> Red Lake O.P.P.

This evidence was not controverted. The desk clerk was not identified although Ms. Cullen suggested that it would have been one of two night clerks, either Ace or Harry. Neither of these people were called as witnesses. Ms. Cullen denied that the hotel had a policy of separation and explained simply that one of the night clerks was new.

Without hesitation, I accept the evidence of Constable Trivett. Clearly, two weeks after Mr. Angeconeb's visit, someone

at the Red Dog Inn exercised their duties on the basis that there were specific rooms for native persons. The evidence of Constable Trivett had been disclosed to representatives of the numbered company. Yet, all written responses, interviews with human rights officers, and the testimony of Ms. Cullen, included flat denials of any policy of separating native people through the room assignment process.

(v) A Prima Facie Case?:

The combination of all the evidence, notwithstanding its circumstantial nature, persuades the Board that a prima facie case of discrimination has been made out. Here, I have considered the condition of the rooms assigned to Mr. Angeconeb on December 13,1988; the statistical evidence; the comments made to Ms. Thunder; and the event of December 28, 1988 involving Constable Trivett.

(vi) Assessing the Circumstantial Evidence:

As discussed above, after finding a prima facie case based on circumstantial evidence, it is necessary to consider whether a rational non-discriminatory explanation was offered and, if so, was it credible. This requires examining the testimony of Respondent Cullen.

Ms. Cullen denied any discriminatory policy or practice on the part of the hotel. Generally, she offered various reasons for the apparent disproportionality in room assignment:

1. It was hotel policy to fill the main building first and then assign the annex rooms;

2. Some regular customers asked specifically for the annex;

3. Some native customers preferred the main building because it was close to the coffee pot;

On their face, these explanations are rational. The question is whether they offer a credible explanation of what appears to be discriminatory treatment.

For the most part, the evidence about these matters contained certain limitations which affected its credibility. First, it lacked specificity. No specifics were provided about any native patron who wanted to be near the coffee pot. Secondly, while some references were made to regular corporate and institutional customers whose employees requested the annex rooms, this evidence was not related directly to the sample period of March 13 to March 20, 1989. Moreover, one wonders how, and why, these corporate and institutional employees first became acquainted with the better annex rooms.

Turning to the policy that the main building be filled first, subject to specific requests, copies of the hotel's guest registration ledger for the periods October 23 to December 19, 1988

and December 20, 1988 to January 30, 1989 were filed as exhibits. These disclosed the order in which guests checked in. Counsel submitted that they established that the hotel did not follow its purported policy. Ms. Cullen responded that some of the annex room assignments made while rooms 101 to 110 were still vacant were probably to regular corporate and institutional customers. She submitted that "the percentage requesting rooms in the annex building could have been as high as 65%." Again, this raises the question of how these people were introduced to the better rooms in the first place. More importantly, while this submission, may be accurate, the fact remains that the main building was almost always available when assignments were made to the annex. Even according to Ms. Cullen, not all guests assigned to the annex appeared to have been regular customers. In her submission on this point, she concluded that the evidence from the registration books was "an exercise in showing prevalence and most definitely not in incidents."

At the very least, the "main building first" policy was unsuccessful. Alternatively, it was not a serious policy. It is difficult to accept this policy as an answer to the room assignment situation. Interestingly, it was referred to not only by Ms. Cullen but also in a memorandum sent to her by Mr. Munro, and filed as an exhibit. This memorandum concluded with the following direction:

> "We will continue to put guests in the rooms that we feel are appropriate at the time of checkin. Attempt to fill the main building before the annex unless guests ask for the annex."

Mr. Munro was not present at the hearing and one can only speculate over what "appropriate" means.

IV. CONCLUSION:

In rebuttal of the circumstantial evidence, various non-discriminatory reasons were offered. While rational, the issue becomes whether they are sufficiently credible to neutralize the inferences drawn from evidence of discrimination. As discussed above, the explanations offered have inherent limitations. The standard is the balance of probabilities and the non-discriminatory explanations must be compared to the entirety of the evidence supporting the claim of discrimination.

One needs only to step back and place Mr. Angeconeb's account against the backdrop provided by the other evidence to conclude that he was subjected to differential treatment because of his race, ancestry, or colour. Any doubts the Board may have had about the statistical evidence or the inferences that can be drawn from the testimony of the human rights officers, are dispelled by the evidence of Constable Trivett. His account of the designation of "native rooms" at the Red Dog Inn on December 28, 1988, cannot be ignored. Along with Mr. Angeconeb's personal account, it gives

meaning to all the other bits of evidence.

The Board is persuaded that over time the Red Dog Inn adopted "practices or attitudes" which had the effect of limiting the services available to customers considered to be native. The Board is persuaded that certain customers were steered toward the superior annex rooms while other customers were assigned inferior rooms in the 101 to 110 range. The distinction was based on race, colour, or ancestry. The Board finds that the room assignment practice, whether intentionally discriminatory or not, was part of how the Red Dog Inn carried on its business. Whether this practice happened in every case is immaterial. It happened on December 13, 1988 when Mr. Angeconeb was assigned his room. As a result of this practice, Mr. Angeconeb received differential treatment by reason of his race, colour, or ancestry. He was subjected to discriminatory treatment in violation of section 1 of the Human Rights Code in that, on December 13, 1988, he was assigned an inferior room in a specific section of the hotel because of his race, ancestry, or colour.

Consequently, the complaint has been proven with respect to the Respondent 571252 Ontario Ltd. For the reasons expressed above regarding the deposit issue and the condonation argument, the complaint against Ruby Cullen is dismissed.

V. REMEDY:

Because the numbered company no longer operates the hotel, this Board is limited in the remedy it might order. Counsel has suggested a monetary order in the amount of $5,000 in compensation for the breach of the Code and the injury to Mr. Angeconeb's dignity.

Section 41(1)(b) authorizes the Board to order restitution "including monetary compensation". This form of remedy is distinct from an award from mental anguish encompassed by the second arm of the provision. It has been recognized in human rights cases that a proven violation by itself entitles the complainant to compensation on two related bases: loss of the right to be free from discrimination; and injury to dignity and self-respect.

In Grant v. Wilcock (1991), 13 C.H.R.R. D/22, an Ontario Board observed:

> "Human rights cases have allowed for awards based on these injuries (see the Cameron case). Awards based on these types of injuries recognize that the very right to be free from unlawful discrimination has an intrinsic value.
>
> I find this concept of a right's intrinsic value to be of great significance. It amounts to the Aristotelian concept that respect for rights creates a balance in our society. Infringement of such rights creates an imbalance which needs rectification on behalf of the whole society and on behalf of the individual who suffers specific injuries from the infringement." (at para. 34-35)

It appears that this approach to compensatory awards is still

available notwithstanding the controversy which has been generated by the Divisional Court decision in York Condominium No. 216 v. Dudnik (1991), 14 C.H.R.R. D/406.

In Lampman v. Photoflair Ltd,(Ont.Bd. of Inquiry, released September 28, 1992) Professor McCamus examined this issue carefully. He concluded that:

> ... the Divisional Court in the York Condominium case appeared to accept the view that general damages could be awarded with respect to the "intrinsic value" of the "loss arising from the infringement". (at page 63)

I agree with this conclusion. Accordingly, without regard to the issue concerning punitive damages or damages for mental anguish as raised in the York Condominium case, a monetary award is appropriate in this case.

While a complainant's subjective perception of injury does is not proof of a violation, once the violation has been established, the subjective response is relevant to remedy. In Mr. Angeconeb's own words, "acts of racism hurt". He said:

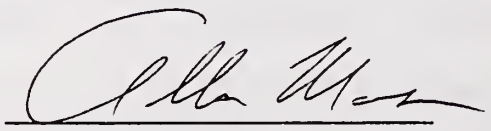
"I was belittled, I was hurt, and I feel those pains."

After hearing Mr. Angeconeb's explanation of the personal impact of the events of December 13, 1988 on him, this Board is persuaded that they were insulting and a diminution of his "dignity as an aboriginal person". He was the victim of a stereotypical discriminatory characterization which would have offended anyone treated in a similar fashion.

Viewed objectively, the practices of the Red Dog Inn, as found by this Board, were invidious. Whether intentional or not, whether planned or not, they served to entrench a form of racist stereotyping which has been part of the burden imposed on native people by the dominant segment in many communities. The facts of this case show that this burden is both real and hurtful. It is not only a barrier to the realization of equality in treatment but also a continuing and significant impediment in the progress toward self-respect and achievement by native people.

Accordingly, the Board orders that the Respondent 517252 Ontario Ltd. pay to the Complainant Garnet Angeconeb the sum of $2,500.00 in compensatory damages.

DATED at Kingston this 24th day of August, 1993.



Allan Manson